

09-3576
SALES TAX
SIGNED 08-30-2010

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,

Petitioner,

v.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

ORDER OF DISMISSAL

Appeal No. 09-3576

Account No. #####

Tax Type: Sales & Use

Tax Year(s): 1/1/98 to 12/31/01

Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP., Representative

For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Assistant Director Auditing Division
RESPONDENT REP. 3, Tax Audit Manager

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Hearing on Motion to Dismiss on March 29, 2010. Petitioner (the "Taxpayer") is appealing Respondent's (the "Division's") denial of a refund request of sales and use tax for the period from January 1, 1998 to December 31, 2001. The refund request was filed by the Taxpayer on October, 8, 2009. The amount of the refund claimed was \$\$\$\$\$.

APPLICABLE LAW

Refund procedures are regulated by statute. Effective in 2009 the applicable statute of limitations was amended to the following at Utah Code Sec. 59-1-1410(8)(a):

(a) Except as provided in Subsection (8)(b) or Section 19-2-1224, 59-7-522, 59-10-529, or 59-12-110, the commission may not make a credit or refund unless a person files a claim with the commission within the later of: (i) three years from the due date of the return, including the period of any extension of time provided in statute for filing the return; or (ii) two years from the date the tax was paid.

The Taxpayer argues the applicable statute of limitations sections are those that were in effect in 2006.

In 2006 Utah Code 59-12-110(2)(b) & (e) provided:

(b) Except as provided in Subsections (2)(c) and (d) or Section 19-2-124, a taxpayer shall file a claim with the commission to obtain a refund or credit under this Subsection (2) within three years from the day on which the taxpayer overpaid the tax, penalty, or interest.

(e) A taxpayer may file a claim to obtain a refund or credit under this Subsection (2) regardless of whether the taxpayer received or objected to a notice of deficiency or a notice of assessment as provided in Subsection 59-12-114(1).

RELEVANT FACTS

The parties were not in dispute as to the relevant facts in this matter and the issues were presented as questions of law before the Commission. On May 1, 2006, the Division issued a Statutory Notice to the Taxpayer for a sales and use tax audit deficiency for the period January 1, 1998 through December 31, 2004. The Taxpayer timely appealed the audit and the case was assigned Appeal No. 06-0679. Subsequent to the appeal being filed the Division amended the audit on September 5, 2006 and the Taxpayer withdrew the appeal based thereon. The Commission's Order of Dismissal was issued on November 6, 2006.

On November 9, 2006 the Taxpayer filed a new appeal regarding the same audit. The case was given Appeal No. 06-1472. The Division moved to dismiss the case on grounds of res judicata and a Hearing on Motion was scheduled for March 19, 2007. The Taxpayer failed to appear at the hearing and Appeal No. 06-1472 was dismissed by Order of Default on March 27, 2007.

On October 8, 2009 the Taxpayer filed a sales tax refund request for \$\$\$\$ in taxes for the years 1998, 1999, 2000 and 2001, which were a portion of the years at issue in the two previous appeals. The basis for the request was that based on the "Doctrine of Equitable Recoupment" it was the Taxpayer's position that it should be able to claim credits or refunds in the years that the auditors had claimed were barred by the statute of limitations. On October 22, 2009 the Division denied the request for refund on the basis that the Taxpayer had already exhausted its appeal rights for the period of January 1, 1998 to December 31, 2004, citing the two previous appeals. Further the Division noted that the request was beyond the statute of limitations period set out at Utah Code Sec. 59-1-1410(8)(a). At the hearing the Division argued it also disagreed with the Taxpayer that equitable recoupment would apply in this case.

The representative for the Taxpayer asserted and the Division did not refute that the funds at issue were paid to the Commission when the Taxpayer paid the amended audit on October 10, 2006.

DECISION

The Division argued that this appeal should be dismissed on two separate grounds. First, the Division argued *res judicata* mandates that the appeal should be dismissed because the issues had been previously appealed and dismissed in two separate appeals. Second, the Division argues the applicable statute of limitations is Utah Code Sec. 59-1-1410(8)(a) which provides the claim for refund must be filed within two years of the date the tax was paid or three years from the due date of the return. It is the provision from the date that the taxes were paid that is at issue because the due date of the returns was many years beyond the statute of limitations period.

Upon review of the facts in this matter, although the claim for refund was submitted within three-years from when the tax was paid, it was clearly more than the two years allowed in Utah Code Sec. 59-1-1410(8)(a). Sec. 59-1-1410 became effective May 2009 and was therefore the applicable law in October 2009 when the Taxpayer filed its request for refund. The Taxpayer argues, however, that it should be the provision in effect at the time the funds were paid that is controlling statute of limitations provisions. The previous provision on the statute of limitations for claiming a sales or use tax refund was set out at Utah Code Sec. 59-12-110(2)(e)(2006-2008). In that prior provision the statute of limitations period was three years from the date the taxes were paid, not the two years of the current provisions. Further, the Taxpayer argues that under the prior code, a taxpayer could request a refund regardless of whether the taxpayer objected to a notice of deficiency, citing to Sec. 59-12-110(2)(e).

Because Utah Code Sec. 59-12-110(2)(e) arguably gave the taxpayer the right to request the refund regardless of whether there had been an appeal, it raises new claim separate from the prior appeals and this separate claim would be outside the scope of *res judicata*. The question then before the Commission is which statute of limitations would apply, the one in effect at the time the tax was paid, or the one the one in effect at the time the refund was requested. The Taxpayer did not provide any statutory provision, case law or prior Tax Commission decisions that support its interpretation of prospective compliance of 59-1-1410.¹ The Taxpayer's

1. There are numerous cases that support the position that statutory revisions that are procedural in nature may be applied retroactively. Neither side briefed or provided cites on whether the revision at issue was procedural or substantive in nature nor whether it should be applied prospectively or retroactively. See the Utah Supreme Court's decision in *Due South, Inc. v. Department of Alcoholic Beverage Control*, 197 P.3d 82 (2008), where the Court held, "[p]rocedural statutes . . . which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions." (citations omitted). See also *Evans & Sutherland Computer v. Utah State Tax Commission*, 953 P.2d 435 (1997) where the Court stated "if the amendments merely regulate the procedures for presenting and resolving a case and do not adversely affect vested rights" retroactive application of the amendment is permitted (citations omitted). See also *Kennecott Utah Copper Corporation v. Utah State Tax Commission*, 87 P.3d 751 (2004); *Beaver County et al., v. Utah State Tax Commission and T-Mobile*

interpretation is contrary to the express provisions of Utah Code Sec. 59-1-1410 which was effective at the time the Taxpayer filed its request for refunds.

Regarding the Taxpayers argument that equitable recoupment should be applied, this was clearly an issue that the Taxpayer could have addressed in the first appeal and chose instead to settle that appeal rather than pursue an administrative hearing and make that argument before the Commission in that proceeding. As the Taxpayer is outside the statute of limitations period, the Taxpayer has no basis to open a new appeal to address this claim.

The Division was correct in denying the refund request based on the two year provisions set out at Utah Code Sec. 59-1-1410(8)(a).

Jane Phan
Administrative Law Judge

ORDER

Based on the foregoing, the Taxpayer's request for refund for the period January 1, 1998 through December 31, 2001 is hereby denied. It is so ordered.

DATED this _____ day of _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

JKP/09-3576, dis.

USA, Inc., 1010 UT 50. In *State of Indiana v. Gibson Circuit Court*, 157 N.E. 2d 475, 478, the Indiana Supreme Court noted, "As a general rule laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are substantive in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are procedural."